

05-470 OCT 7 - 2005

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
CIPRIANO SALDIVAR-GUERRERO  
*Petitioner*

v.

ALBERTO GONZALES ATTORNEY GENERAL  
*Respondent*

\_\_\_\_\_  
**On Petition for A Writ Of Certiorari  
To The United States Court of Appeals  
For The Ninth Circuit**

USCA NO.: 04-72192  
Agency No.: A76-611-057

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**

\_\_\_\_\_  
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## **QUESTIONS PRESENTED**

- A. DID THE NINTH CIRCUIT COURT OF  
APPEAL ERR IN DENYING PETITIONER'S  
PETITION FOR REVIEW**

## **LIST OF PARTIES**

**The party in this case is the United States Immigration and Naturalization Service.**

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## TABLE OF AUTHORITIES

CITED CASES	Page
<u>The Chinese Exclusion Case</u> , 130 U.S (1889)	6
<u>Fong Yue Ting v. United States</u> , 149 U.S. 698, (1893)	6
<u>Knauff v. Shaughnessy</u> , 338 U.S. 537 (1950)	6
<u>The Japanese Immigrant Case</u> , 189 U.S. 186 (1903)	6
<u>Woo Sung v. McGrath</u> , 339 U.S. 33 (1950)	6
<u>Kwong Hai Chow v. Colding</u> 344 U.S. 590, 598, (1953)	6
<u>Shaughnessy v. Mezei</u> , 345 U.S. 206 (1953)	7
<u>Reno v. Flores</u> , 507 U.S. 292, 306, 123 L. Ed. 2d. 1, 113 S. Ct. (1993)	7
<u>Felzcerek v. INS</u> , 75 F. 3d 112, 115, ) 2 <sup>nd</sup> Cir.1996)	7
<u>Singh v. INS</u> , 213 F. 3d 1050 (9 <sup>th</sup> Cir. 2000)	8
<u>INS v. Doherty</u> , 502 U.S. 314, 3243, (1992)	8,11
<u>Matter of Leon-Orosco and Rodriguez Colas</u> , 19 I&N Dec. 136, 139, (BIA 1983, A.G. 1984); *C.F.R. Section 103.5 (1996)	8
<u>INS v. Abudu</u> , 485 U.S. 94, 97, (1988)	9
<u>Ramon Sepulveda v. INS</u> , 743 F. 2d 1207 (9 <sup>th</sup> Cir. 1984)	9,10
<u>Guzman v. INS</u> , 318 F. 3d 911, 912, (9 <sup>th</sup> Cir. 2003)	9

<u>Sida v. INS</u> , 665 F. 2d 851 (9th Cir. 1981)	10,12
<u>Santana-Figueroa v. INS</u> , 644 F. 2d 1354, 1357, (9 <sup>th</sup> Cir. 1981)	12
<u>Bolshakov v. INS</u> , 133 F. 3d 1279, 1280, (9 <sup>th</sup> Cir. 1998)	13
<u>Matter of Monreal</u> , 23 I&N Dec. 56	13
<u>Matter of Inge</u> , 20 I&N Dec. 880 (BIA 1994)	14
<u>Shoafera v. INS</u> , 2000 U.S. App. LEXIS 31361d (9 <sup>th</sup> Cir. 2000)	14
<u>Matter of Recinas</u> , 23 I&N Dec. 476 (BIA 2002)	14
<u>Tukkhwinich v. INS</u> , 64 FD. 3d 460 (9 <sup>th</sup> Cir. 1995)	14
<u>Chavez-Murillo v. INS</u> , 1999 WL 728521 (9 <sup>th</sup> Cir. 1999)	15

**IN THE SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI**

**Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.**

**OPINIONS BELOW**

**{X} For cases from Federal Courts**

**The opinion of the United States Court of Appeal  
appears at Appendix A to the petition and is**

**{X} is unpublished.**

## JURISDICTION

- [X] For cases from federal Court
- [X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 15, 2005, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254



**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

**Immigration and Nationality Act Section 240A**

**12**

## STATEMENT OF THE CASE

Petitioner is a thirty-three year old male, who is a native and citizen of Mexico. He entered the United States or about June 1986, at age fifteen and has remained in the United States ever since that time. Petitioner was subsequently placed in immigration proceedings and presented a petition for Cancellation of Removal at a hearing held on May 1, 2000. At the conclusion of the hearing the Immigration Judge granted the Petitioner's application. The Immigration and Naturalization Service appealed the decision of the Immigration Judge by arguing that the Petitioner had failed to demonstrate that his removal would cause an undue hardship to his United States citizen children.

On January 13, 2003, the Board of Immigration Appeals sustained the appeal filed by the INS and remanded the case to the Immigration Judge for determination. On February 19, 2003, the Petitioner was granted voluntary departure. At the time of the Petitioner's Merits Hearing the issue of the hardship to his American citizen children was not addressed. The petitioner sought a psychological evaluation of his oldest son who was experiencing trauma-like symptoms. The psychological evaluation revealed that the Petitioner's removal would cause an extreme emotional impact to the child who was at that time ten years old.

The psychological evaluation portrayed the Petitioner's oldest son as a large, overweight boy, with very limited knowledge of the Spanish language and culture. Record information given by the Mexican Consulate stated that Bryan, the Petitioner's son, would be demoted to the first grade when he returned to Mexico because of his lack of language and Mexican history skills. This demotion was determined to subject Bryan to

rejection and ridicule at the hand of the first graders because of his age and size. The result of this rejection and lack of social acceptance would result in severe and negative emotional distress and have substantial psychological affects. It was further determined that Bryan would not likely complete high school and that the possibility of leading a productive life would be greatly diminished.

This evidence brought to light new facts that were not addressed by the Immigration judge in his decision to remove the Petitioner. With this in mind the Petitioner filed a motion to Reopen based on new evidence to be presented.

On May 13, 2003, the Immigration Judge denied the Petitioner's motion to reopen based on the fact that although he had formerly decided that the Petitioner was eligible for Cancellation of Removal, the BIA had overturned his decision and the Court could not now reopen the case to consider the new evidence. The BIA affirmed the Immigration judge's decision without an opinion.

The Petitioner then filed a Motion To Reopen with the BIA based on his contention that the Immigration Judge had misapplied the facts of the case and failed to analyze as evidence, the psychological report outlining the emotional stress the petitioner's son would face if he was removed to Mexico.

On January 13, 2005 the BIA denied the Petitioners Motion To Reopen and stated that they did not believe that the Petitioner's children would suffer extreme or unusual hardship if they were removed to Mexico.

Petitioner then filed a Petition for Review of the decision of the BIA with the Ninth Circuit Court of Appeals. This petition was denied on July 15, 2005.

The Petitioner now files his Petition for a Writ of Certiorari with the Supreme Court of the United States.

### **THE COURT OF APPEAL ERRED BY FAILING TO GRANT PETITIONER'S MOTION FOR REVIEW**

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698, (1893), Knauff v. Shaughnessy, 338 U.S. 537 (1950).

However it is also clear that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case, 189 U.S. 186 (1903); Woo Yan Sung v. McGrath, 339 U.S. 33, (1950), Kwong Hai Chew v. Colding 344 U.S. 590, 598, (1953),

In Wong Yang Sung v. McGrath, 339 U.S. 33, (1950), it is stated that "Our law may, and does place more restrictions on the alien than the citizen. But basic fairness in hearing procedure does not vary with the status of the accused. If the procedures used to judge the alien are fair and just, no good reason can be given why they should not be extended to simplify the condemnation of